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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| Proceeding | 92061150 |
| Party | Defendant<br>Bigfoot Entertainment Inc. |
| Correspondence Address | BIGFOOT ENTERTAINMENT INC<br>246 WEST BROADWAY<br>NEW YORK, NY 10013<br>UNITED STATES |
| Submission | Motion to Dismiss - Rule 12(b) |
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| Signature | /Barth X. deRosa/ |
| Date | 05/04/2015 |
| Attachments | 64884-2 MOTION_TO_DISMISS.pdf(96747 bytes ) |

Docket No. 64884-2

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| FASHION TV PROGRAMMGESELLSCHAFT mbH<br><br>Petitioner/Plaintiff,<br><br>v.<br><br>BIGFOOT ENTERTAINMENT, INC.,<br><br>Respondent/Defendant. | Cancellation No. 92061150<br><br>Registration No. 2,945,407 |

**MOTION TO DISMISS UNDER RULE 12(b)(6) FED. R. CIV. P.**
**FOR LACK OF STANDING BY PETITIONER**

Respondent, Bigfoot Entertainment, Inc., through its attorneys and in lieu of an answer, respectfully moves to dismiss the petition to cancel on the grounds that Petitioner, Fashion TV Programmgesellschaft MBH, has failed to allege the grounds necessary to establish its standing or real interest in filing and maintaining the cancellation.

In the event this motion is denied, Respondent requests that it be given sufficient time to answer the petition to cancel or otherwise plead.

**FACTS**

Registration No. 2,945,407 issued on May 3, 2005 for the mark FT FASHION TELEVISION and Design for broadcasting programs via a global computer network in Class 38 and for production and distribution of television programs and entertainment services in the nature of an ongoing series of television programs essentially involving fashion and pop culture in Class 41. The registration initially issued to CHUM, Ltd., a Canadian company, and became

incontestable by reason of the declarations filed under Sections 8 and 15 of the Lanham Act in 2010.

Through a number of acquisitions and assignments, the registered mark is now owned by Bigfoot Entertainment, Inc., a corporation organized under the laws of Delaware with a principal place of business in New York, New York. Bigfoot Entertainment, Inc. purchased all rights to the mark, including the goodwill symbolized thereby, in December 2014 from Bell Media, Inc., a Canadian company and former owner of Registration No. 2,945,407. The assignment was properly recorded with the U.S. Patent and Trademark Office on February 17, 2015 in Reel 005461, Frame 0200.

On March 25, 2015, Fashion TV Programmgesellschaft mbH filed the present petition to cancel the registered mark alleging "abandonment" by Bell Media, Inc. for "nonuse," but not by Respondent Bigfoot Entertainment. In the preamble of the petition, Fashion TV alleges that it has "been damaged" by Registration No. 2,945,407, but at no point in its petition alleges the basis for this damage, nor does it allege in any manner that it is using a similar mark, that it has an intent to use a similar mark, or any other basis about "why" it is damaged or believes it is apt to be damaged by the registered mark. All Petitioner does is essentially recount the ownership history of Registration No. 2,945,407. At this point, it should be noted that Petitioner had prior business dealings with international entities "affiliated" with Bigfoot Entertainment, Inc.

**THE LAW**

It is well established under Board practice that a petitioner seeking cancellation of a registered mark need not plead or prove actual damage. By the same token, a petitioner is still required to plead facts that support a reasonable belief that there is or is apt to be a likelihood of damage caused by continued registration of the mark. "[A] petition to cancel must include (1) a

short and plain statement of the reason(s) why petitioner believes it is or will be damaged by the registration sought to be cancelled…" TMBP Section 309.03(a)(2). "At the pleading stage, all that is required is that a plaintiff alleges facts sufficient to show a 'real interest' in the proceeding, and a 'reasonable basis for its belief of damage.'" TMBP Section 309.03(b).

"The purpose in requiring standing is to prevent litigation where there is no real controversy between the parties, where a plaintiff, petitioner, or opposer, is no more than an intermeddler." *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028-1029, 213 USPQ 185 (C.C.P.A. 1982).

**ARGUMENT**

While "mere intermeddlers" rarely bring such challenges, they do, as here, arguably occur. As noted above, Petitioner had prior business dealings with international entities affiliated with Respondent, and Petitioner, on information and belief, has no real interest in using the registered mark or a mark similar thereto. Notwithstanding the fact the parties are involved in a pending federal court litigation initiated by Petitioner, there is no apparent allegation in the petition about "why" Petitioner believes it will be damaged by continuation of the registration.[1] A mere statement that it believes it has been "damaged," without more, is insufficient to support a reasonable belief that there is a likelihood of damage. *Lipton Industries*, supra.

Thus, at this stage, Respondent has no option but to test the sufficiency of Petitioner's allegations and apparent lack of standing to bring the cancellation. While Petitioner might very well have standing, Petitioner needs to articulate the basis for that belief to distinguish itself from a "mere intermeddler." Until Petitioner establishes its standing and real interest in the petition

[1] See *F. TV Ltd. and Fashion TV Programmgesellschaft mbH v. Bell Media and Bigfoot Entertainment, Inc.*, 14 Civ. 9856 (KBF) (S.D.N.Y.).

through proper allegations, it cannot at this point prevail with its claim that the registered mark has been abandoned. Once standing is established, only then is Petitioner entitled to rely on the merits on "any statutory ground which negates [Respondent's/Registrant's] right to the subject registration. . ." J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Section 20.46, p. 20-127, (June 2013) [*citations omitted*].

**CONCLUSION**

In view thereof, the petition to cancel should be dismissed for lack of standing.

Further action is respectfully solicited.

Respectfully submitted,

BIGFOOT ENTERTAINMENT, INC.

Date: May 4, 2015

/s/ Barth X. deRosa

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss under Rule 12(b)(6) for Lack of Standing by Petitioner is being forwarded this 4th day of May, 2015 to counsel for Petitioner by email and first class mail, addressed to:

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